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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,	)	Criminal Case No. 07cr2953-IEG
Plaintiff,	)	**RESPONSE AND OPPOSITION TO DEFENDANT'S MOTIONS:**
v.	)	**(1) DISMISS THE INDICTMENT DUE TO MISINSTRUCTION OF THE GRAND JURY**
JORGE HERNANDEZ,	)	**(2) TO COMPEL DISCOVERY**
	)	**(3) TO FILE FURTHER MOTIONS**
Defendant.	)	Date: January 22, 2008 Time: 2:00 p.m. Court: The Hon. Irma E. Gonzelez

COMES NOW the plaintiff, UNITED STATES OF AMERICA, by and through its counsel, United States Attorney, Karen P. Hewitt, and Assistant U.S. Attorney Rebecca S. Kanter, and hereby files its Response and Opposition to Defendant's Motions to Dismiss the Indictment Due to Misinstruction of the Grand Jury, Compel Discovery and File Further Motions. This Response and Opposition is based upon the files and records of this case, together with the attached Statement of Facts and Memorandum of Points and Authorities.

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I

STATEMENT OF FACTS

A. Defendant's Apprehension

On September 4, 2007, at about 4:00 a.m., Defendant attempted to enter the United States from Mexico near Tecate, California. Defendant was first spotted by a California National Guard Unit operating a mobile infrared scope. Defendant was seen crossing the United States/Mexico boundary and hiding in the brush near Ceti's Hill, which is approximately 2 miles east and 100 yards north of the Teacate, California Port of Entry. Defendant was found lying down in the brush approximately 30 yards south of the Border Road. The Defendant admitted to being a citizen and national of Mexico with no documents to legally remain in the United States. Defendant was transported to the Tecate Processing Center.

B. Defendant's Criminal and Immigration History

Defendant has numerous arrests and convictions in California and Oregon. Defendant's more recent felony criminal history includes but is not limited to a conviction in the United States District Court for the Southern District of California on February 1, 2002, for Illegal Entry in violation of Title 8, United States Code Section 1325. Defendant was sentenced to 24 months in custody by The Honorable Gordon Thompson, Jr.

Prior to that, Defendant was convicted in March, 1997, by the California Superior Court in Santa Clara for Possession of Marijuana for Sale in violation of California Health & Safety Code Section 11359, for which he received a sentence of 2 years imprisonment. Ten years later, in May, 2007, Defendant sustained a conviction in the California Superior Court in Santa Ana for Possession of a Controlled Substance in violation of California Health & Safety Code Section 11377(a).

Defendant appeared before an Immigration Judge for a deportation hearing on November 20, 2005, and was physically removed from the United States to Mexico that same day. Defendant was most recently physically removed to Mexico on August 22, 2007, approximately two weeks before the instant offense.

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C. Defendant's Post-Miranda Confession

Defendant was read his Miranda rights and advised of his right to notify the Mexican Consulate. Defendant waived his rights and admitted that he is a citizen and national of Mexico with no documents to legally enter or remain in the United States. He further admitted to having been previously deported from the United States. He stated that he knew he was breaking the law by crossing into the United States through the mountains. He admitted to prior arrests and a prior drug conviction. He stated he was en route to Santa Ana, California to find work.

II

DEFENDANT'S MOTIONS TO COMPEL DISCOVERY

On September 21, 2007, the Government produced, and Defendant's prior attorney, Erick Guzman, picked up 46 pages of discovery and one DVD for Defendant which included the reports from the Border Patrol Agents, summaries of the statements made by Defendant, documentation regarding Defendant's criminal history and conviction documents, and a recording of his post-Miranda confession.

(A) Defendant's Statements

The Government recognizes its obligation, under Rules 16(a)(1)(A) and 16(a)(1)(B), to provide to Defendant the substance of Defendant's oral statements and written statements. (Unless otherwise noted, all references to "Rules" refers to the Federal Rules of Criminal Procedure.) The Government will produce all of the Defendant's statements that are known to the undersigned Assistant U.S. Attorney at this date. If the Government discovers additional oral or written statements that require disclosure under Rule 16(a)(1)(A) or Rule 16(a)(1)(B), such statements will be promptly provided.

(B) Defendant's Prior Record, Prior Bad Acts, and Notice Under FRE 404(b)

The Government has already provided Defendant with documentation regarding his prior criminal record, including judgment and conviction documents, and has thereby fulfilled its duty of discovery under Rule 16(a)(1)(D).[1/] See United States v. Audelo-Sanchez, 923 F.2d 129 (9th Cir. 1990).

[1/] Defendant requests evidence of his prior record pursuant to Rule 16(a)(1)(B). The Government interprets this as a request pursuant to Rule 16(a)(1)(D), which is the section of the discovery rule pertaining to a defendant's prior record.

To the extent that the Government determines that there are any additional documents reflecting Defendant's prior criminal record, the Government will provide those to Defendant.

The Government will disclose in advance of trial the general nature of any "other bad acts" evidence that the United States intends to introduce at trial pursuant to Fed. R. Evid. 404(b). Evidence should not be treated as "other bad acts" evidence under Fed. R. Evid. 404(b) when the evidence concerning the other bad acts and the evidence concerning the crime charged are "inextricably intertwined." United States v. Soliman, 812 F.2d 277, 279 (9th Cir. 1987).

(C) Other Documents and Physical Objects

The Government has complied and will continue to comply with Rule 16(a)(1)(E)[2/] in allowing Defendant an opportunity, upon reasonable notice, to examine, inspect, and copy documents and physical objects that are within its possession, custody, or control, and that is either material to the preparation of Defendant's defense, or is intended for use by the Government as evidence during its case-in-chief at trial, or was obtained from or belongs to Defendant. The Government need not, however, produce rebuttal evidence in advance of trial. United States v. Givens, 767 F.2d 574, 584 (9th Cir. 1984).

(D) Scientific Tests or Examinations

At this time, the Government is not aware of any scientific tests or examinations performed in connection with this case. If the Government becomes aware of such evidence, the results of any scientific tests or examinations will be provided to Defendant in accordance with Rule 16(a)(1)(F)[3/] when those tests results are received.

(E) Witness Discovery

Defendant is not entitled to any evidence that a prospective witness is under criminal investigation by federal, state, or local authorities. The Government is under no obligation to turn over

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[2/] Defendant makes this request under Fed. R. Crim. P. 16(a)(2)(C). Because there is no such subsection in Rule 16, the Government interprets this as a request under Rule 16(a)(1)(E) which applies to the discovery of documents and objects.

[3/] Defendant requests reports of scientific tests or examination pursuant to Rule 16(a)(1)(D). Because that subsection refers to Defendant's Prior Record, the Government interprets this as a request pursuant to Rule 16(a)(1)(F) which pertains to Reports of Examinations and Tests.

the criminal records or rap sheet of its potential witnesses. United States v. Taylor, 542 F.2d 1023, 1026 (8th Cir. 1976). The Government will, however, provide the conviction record, if any, which could be used to impeach witnesses the United States intends to call in its case-in-chief.

The Government recognizes its obligation under Brady and Giglio to provide material evidence that could be used to impeach Government witnesses, including material information related to perception, recollection, ability to communicate, or truth telling. The Government strenuously objects to providing any evidence that a witness has ever used narcotics or other controlled substance, or has ever been an alcoholic because such information is not discoverable under Rule 16, Brady, Giglio, Henthorn, or any other Constitutional or statutory disclosure provision.

The Government similarly recognizes its obligation under Brady and Giglio to provide evidence that could be used to impeach Government witnesses including material information regarding demonstrable bias or motive to lie. The Government is not aware of any evidence of any bias or motivation to lie on the part of prospective government witnesses. If the Government discovers the existence of information related to a government witness's bias or motive to lie, the information will be provided to the Defendant.

The Government has provided Defendant with the reports containing the names, work addresses, and telephone numbers of the inspectors, officers and special agents who asked questions of Defendant and found the marijuana in the vehicle. In its trial memorandum, the Government will provide Defendant with a list of all witnesses whom it intends to call in its case-in-chief, although delivery of such a witness list is not required. See United States v. Discher, 960 F.2d 870 (9th Cir. 1992); United States v. Mills, 810 F.2d 907, 910 (9th Cir. 1987).

The Government will comply with United States v. Henthorn, 931 F.2d 29 (9th Cir. 1991) and request that all federal agencies involved in the criminal investigation and prosecution review the personnel files of the federal law enforcement inspectors, officers, and special agents whom the Government intends to call at trial and disclose information favorable to the defense that meets the appropriate standard of materiality. United States v. Booth, 309 F.3d 566, 574 (9th Cir. 2002) (citing United States v. Jennings, 960 F.2d 1488, 1489 (9th Cir. 1992). If the undersigned Assistant U.S. Attorney is uncertain whether certain incriminating information in the personnel files is "material," the information will be submitted to the Court for an in camera inspection and review.

(F) Jencks Act Material

Rule 26.2 incorporates the Jencks Act, 18 U.S.C. §3500, into the Federal Rules of Criminal Procedure. The Jencks Act requires that, after a Government witness has testified on direct examination, the Government must give the Defendant any "statement" (as defined by the Jencks Act) in the Government's possession that was made by the witness relating to the subject matter to which the witness testified. 18 U.S.C. §3500(b). For purposes of the Jencks Act, a "statement" is (1) a written statement made by the witness and signed or otherwise adopted or approved by her, (2) a substantially verbatim, contemporaneously recorded transcription of the witness's oral statement, or (3) a statement by the witness before a grand jury. 18 U.S.C. §3500(e). If notes are read back to a witness to see whether or not the government agent correctly understood what the witness was saying, that act constitutes "adoption by the witness" for purposes of the Jencks Act. United States v. Boshell, 952 F.2d 1101, 1105 (9th Cir. 1991) (citing Goldberg v. United States, 425 U.S. 94, 98 (1976)). There is no applicable Jencks material at this time. If the case proceeds to trial, the Government will produce any materials covered by the Jencks Act relevant to the testifying witness(es).

(G) Disclosure Concerning Informants and Percipient Witnesses

An agreement that the Government makes with a witness for testimony in exchange for money or in exchange for favorable treatment in the criminal justice system is generally subject to disclosure as impeachment evidence under Brady and Giglio. See United States v. Kojayan, 8 F.3d 1315, 1322-23 (9th Cir. 1993); Benn v. Lambert, 238 F.3d 1040, 1054-60 (9th Cir. 2002). The Government is not aware of any Giglio information related to this case. If the Government discovers the existence of Giglio information, the information will be provided to the Defendant.

(H) Other Exculpatory Evidence

The Government will perform its duty under Brady v. Maryland, 373 U.S. 83 (1963) to disclose material exculpatory information or evidence favorable to Defendant when such evidence is material to guilt or punishment. The Government recognizes that its obligation under Brady covers not only exculpatory evidence, but also evidence that could be used to impeach witnesses who testify on behalf of the United States. See Giglio v. United States, 405 U.S. 150, 154 (1972); United States v. Bagley, 473 U.S. 667, 676-77 (1985). This obligation also extends to evidence that was not requested by the defense. Bagley, 473 U.S. at 682; United States v. Agurs, 427 U.S. 97, 107-10 (1976). "Evidence is material, and must be disclosed (pursuant to Brady), 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" Carriger v. Stewart, 132 F.3d 463, 479 (9th Cir. 1997) (en banc). The final determination of materiality is based on the "suppressed evidence considered collectively, not item by item." Kyles v. Whitley, 514 U.S. 419, 436-37 (1995).

Brady does not, however, mandate that the Government open all of its files for discovery. See United States v. Henke, 222 F.3d 633, 642-44 (9th Cir. 2000) (per curiam). Under Brady, the United States is not required to provide: (1) neutral, irrelevant, speculative, or inculpatory evidence (see United States v. Smith, 282 F.3d 758, 770 (9th Cir. 2002)); (2) evidence available to the defendant from other sources (see United States v. Bracy, 67 F.3d 1421, 1428-29 (9th Cir. 1995)); (3) evidence that the defendant already possesses (see United States v. Mikaelian, 168 F.3d 380-389-90 (9th Cir. 1999) amended by 180 F.3d 1091 (9th Cir. 1999)); or (4) evidence that the undersigned Assistant U.S. Attorney could not reasonably be imputed to have knowledge or control over. See United States v. Hanson, 262 F.3d 1217, 1234-35 (11th Cir. 2001). Brady does not require the Government "to create exculpatory evidence that does not exist," United States v. Sukumolahan, 610 F.2d 685, 687 (9th Cir. 1980), but only requires that it "supply a defendant with exculpatory information of which it is aware." United States v. Flores, 540 F.2d 432, 438 (9th Cir. 1976).

The Government will provide Defendant with all Brady material that may result in mitigation of Defendant's sentence. Nevertheless, the Government is not required to provide information bearing on Defendant's sentence until after Defendant's conviction or guilty plea and prior to her sentencing date. See United States v. Juvenile Male, 864 F.2d 641, 647 (9th Cir. 1988) (no Brady violation occurs "if the evidence is disclosed to the defendant at a time when the disclosure remains in value").

III

DEFENDANT'S MOTION FOR LEAVE TO FILE ADDITIONAL MOTIONS

The Government does not object to the granting of leave to file further motions as long as the further motions are based on newly discovered evidence or discovery provided by the Government subsequent to the instant motion at issue.

IV

CONCLUSION

For the foregoing reasons, the Government requests that the Court deny Defendant's motions, except where unopposed.

DATED: January 17, 2008.

Respectfully submitted,

KAREN P. HEWITT
United States Attorney

/s/***Rebecca Kanter***
REBECCA S. KANTER
Assistant United States Attorney
Attorneys for Plaintiff
United States of America

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. JORGE HERNANDEZ, Defendant.	)	Criminal Case No. 07cr2953-IEG CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED THAT:

I, REBECCA S. KANTER, am a citizen of the United States and am at least eighteen years of age. My business address is 880 Front Street, Room 6293, San Diego, California 92101-8893.

I am not a party to the above-entitled action. I have caused service of **RESPONSE AND OPPOSITION** on the following parties by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them.

Michael E. Burke

I hereby certify that I have caused to be mailed the foregoing, by the United States Postal Service, to the following non-ECF participants on this case:

None

the last known address, at which place there is delivery service of mail from the United States Postal Service.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 17, 2008.

/s/ ***Rebecca Kanter***
REBECCA S. KANTER